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October 28, 2008

Rachael Powers
Governor's Office of Crime Control and Prevention

VIA E-MAIL (PDF)

Re: Death Penalty Commission Recommendation

Dear Ms. Powers:

Thank you for returning my voice mail message yesterday. I am including with this cover letter, a copy of written testimony I submitted to the Senate Judicial Proceedings Committee, which also included a copy of a piece I wrote that was published in the Washington Post outlining what I believe would be a more practical and politically feasible resolution of the death penalty debate in Maryland, involving higher standards of proof, and narrowing the specific crimes that are death-penalty eligible.

I am sorry for getting this information to the Commission so late, but unfortunately, I have been distracted by many other matters, most prominently recovering from a serious physical injury that required myself to stop working and get back surgery this summer. Thus, I have been unable to participate in any of the meetings that the Commission had scheduled.

I would ask that you please forward this cover letter and the attachments to the Committee members for their consideration. As I noted in the Washington Post piece, I personally have no real objection to the abolition of the death penalty in Maryland. That being said, I also recognize that there are a substantial majority of Marylanders who disagree, and wish to keep the death penalty. I am not convinced from a legislative standpoint, that the moral choice that I believe is correct, is something that must be decided by this Commission, particularly given the public opinion polls on the subject.

Frankly, if this Commission were to simply conclude that the death penalty should be abolished, that will not resolve the two extreme positions of the people who generally participate in Commissions formed to study the issue; they are either hard-line against any death penalty, or hard-line in favor of the death penalty. I have noticed very little effort expended to seek 'common ground' on what is both an important criminal

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justice and moral issue. Most people, in real life, are in the middle, and I have received a lot of input from persons who have contacted or commented to me upon reading the Post piece, including state prosecutors, and stated that they prefer the approach that I have recommended.

I am concerned that if the Death Penalty Commission were to take the 'boring and predictable'¹ approach in repealing the death penalty, that this Commission's report will be of limited utility on the death penalty debate that goes beyond just the state of Maryland. Maryland, as you know, rarely executes persons. States that regularly execute prisoners on the other hand, such as Virginia or Texas, I believe could learn a lot from this Commission taking a moderate approach on the subject. I think at the very least, this Commission should have as a Plan 'B,' a recommendation to Governor Martin O'Malley that somewhat mirrors the recommendations that I set forth in my written testimony to the Senate Judicial Proceedings Committee.

Should you or any other Commission members wish to contact me with additional questions or requests for information, feel free to contact my office.

Cordially yours,

A handwritten signature in black ink, appearing to read "Michael Wein".

Michael Wein, Esquire

Enclosures

¹ Not to remotely suggest that a persons' life should be construed as 'boring and predictable,' just that Maryland's influence in the death penalty debate nationwide would be significantly muted, in my opinion, if the death penalty would be simply repealed in an overwhelmingly Democratic state.

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March 6, 2008

Chairman Brian Frosh
Senate Judicial Proceedings Committee
Miller Senate Office Building
Annapolis, MD 21401

Dear Senator Frosh and Committee Members:

Re: Senate Bill 645

I write neither in favor nor opposition of Senate Bill 645, but offer a substitute legislative proposal for consideration to this Committee. When I was running for the House of Delegates five years ago, I drafted a proposal for 'reforming' the death penalty, but did not publish the ideas. I am relating the main ideas in this letter. A summary of part of this proposal was published in the Washington Post on January 27, 2008 and is attached to this letter.

Although I personally oppose the death penalty and would support its repeal in Maryland, it appears that a substantial amount of Marylanders appear to favor the death penalty, with a recent Baltimore Sun poll finding 57 % support the death penalty, with 33% opposed. However, given the media reports that this Committee will have insufficient votes to support a repeal of the death penalty, I therefore would recommend as a 'Plan B' on the issue, that this Committee consider this alternative legislative proposal, so as to take a national lead on the death penalty issue by advocating substantial improvements through; (1) significantly reducing the likelihood that an innocent person will be executed, and (2) insuring that the death penalty is used only on the 'worst of the worst,' which would reduce the overall prevalence of the death penalty.

I. Primary Legislative Recommendations

- 1. Require that Juries Deciding the Death Penalty find that the Mitigating Factors for Imposition of the Death Penalty Be Proven Beyond a Reasonable Doubt or Beyond a Lingering Doubt.**

The present law in the State of Maryland is that jurors need only find by a preponderance of the evidence that the aggravating factors outweigh the mitigating

factors in order for a person to be executed. In 2003 *Oken* case, a 4-3 minority of the Court of Appeals of Maryland concluded that this standard should instead be ‘beyond a reasonable doubt’ in order to pass Constitutional muster under the Supreme Court’s *Apprendi* case. It would be within the legislative bailiwick to pass legislation to make the standard ‘beyond a reasonable doubt,’ and this would be consistent with the Minority’s opinion in *Oken*.

The recent Court of Appeals of Maryland case of *Borchardt*, discusses a related but different concept of “proof beyond a lingering doubt.” See Slip Op. at 6, fn. 2. Basically, this standard would be higher than even a reasonable doubt standard, and only permit the death penalty if there is a virtual certainty that the Defendant is guilty. Though not of a Constitutional dimension, this standard has been defined by the United States Supreme Court as “a lingering uncertainty about facts, a state of mind that exists somewhere between beyond a reasonable doubt and absolute certainty.” *Franklin v. Lynaugh*, 487 U.S. 164, 188 (1988) (Justice O’Connor, J., concurring) This standard would not affect the ‘proof beyond a reasonable doubt’ standard in order to convict a defendant, but would help address the real concern that innocent people have been sentenced to death and executed, by making it more difficult to execute someone convicted only with circumstantial evidence or notoriously unreliable witness identifications. One way this may be done would be to legislate that convicted defendants need to be found deserved of death “beyond any reasonable doubt” and that includes against any “lingering doubt” that the person is innocent of the crime.

The voters of Wisconsin last year approved a non-binding ballot initiative to reinstitute the death penalty, presuming that DNA evidence exists to support conviction. While this concept has some facial appeal, it is misguided in the sense that DNA evidence is not foolproof, as an errant hair does not necessarily mean that the criminal is guilty. (And there has been papers discussing the “CSI-effect” on law enforcement efforts to convict criminals, of which criminals are also aware of the influence of DNA in prosecutions) A better way to ensure that only the innocent are convicted is to provide a higher standard than even “proof beyond a reasonable doubt,” approaching near certainty in order for the jury to find that the State of Maryland should kill someone.

2. Eligibility Factors For Death Penalty Defendants Should be Limited to the ‘Worst of the Worst’ Criminals

There are concerns that the death penalty has been used inappropriately for cases that while technically are death penalty eligible, are not the ‘worst of the worst’ to which the significant majority of public support for the death penalty seems to favor. Baltimore County is a perfect example of this, where the previous State’s Attorney, in order to avoid favoritism or discrimination concerns being lodged against the Office, sought the death penalty in **every** death penalty eligible case. This, in my opinion, is an abdication of prosecutorial discretion, and inappropriate. There has been anecdotal evidence discussed in major newspapers of prosecutors in Baltimore County, on cases where the defendant was obviously mentally ill, putting forth zero evidence in support during the penalty phase, just to comply with the State’s Attorney’s mandate of seeking

the death penalty in every case. Most of the persons on death penalty in Maryland are there because of the former Baltimore County State's Attorney's mandate.

Although there may be some disagreement of what should be death penalty eligible cases, I would suggest the following prerequisite conditions.

- A. Murder of a Public Officer (Police officer, judge, prosecutor) in the line of duty (and it is known to the criminal that they are a public officer) or done in retaliation for work done in the line of duty; or
- B. Multiple murders of at least 2 people done with specific intent to cause the murders; or
- C. Intentional murder with the intentional infliction of torture. The Constitution Project has come up with a definition of torture in death penalty cases that may be workable, involving a prolonged period of time where the criminal caused pain to the victim prior to the victim's death.

Of particular import on this point is that many of the persons that are found to be death penalty eligible in states, are convicted based on the Felony Murder rule, or have significant mental disorders. No one is saying that these persons should not spend the rest of their lives in jail, but persons who are under the influence of drugs or alcohol and shoot a store clerk during the course of a robbery, may not be beyond redemption based on this single act, and are not the 'worst of the worst' that the death penalty was meant to be used against.

The two legislative recommendations proposed above, particularly if adopted together, would have public support, and can provide a guide for other states such as Virginia and Texas who will not repeal their death penalty statutes any time in the near future, but may adopt a progressive approach to the death penalty as recommended in this letter. I hope that this letter and attached opinion piece in the Washington Post is helpful to this Committee on this important issue. Please feel free to contact me should you have any further questions or need additional information.

Cordially yours,



Michael Wein, Esquire

CLOSE TO HOME

electricity equivalent of two wise County plants.

Climate Action Network.

Doubt and Death in Md.

When New Jersey abolished the death penalty last month, it was the first state to do so since the death penalty was reinstituted in 1976. Maryland, like New Jersey, is an infrequent user of the death penalty, with five executions since 1976 and five prisoners on death row.

Should Maryland follow New Jersey's lead on ending the death penalty? Personally, I say sure. But given the difficulty in a repeal bill passing out of the Senate Judicial Proceedings Committee and a recent poll showing that 57 percent of Marylanders support the death penalty (with 33 percent opposed), Gov. Martin O'Malley should instead take the lead against the death penalty in a way that may be adopted by states unlikely to rescind the law. He should support strengthening the standard for sentencing a person to death to at least a "reasonable doubt" standard, or use an even higher standard of "beyond a lingering doubt."

The standard for conviction down to the lowliest criminal offense has long been that a person may not be convicted without proof of guilt "beyond a reasonable doubt." Yet current law in Maryland is that jurors need only find by a "preponderance of the evidence" that the aggravating factors outweigh the mitigating factors in order for someone to be executed (the same standard as in a regular civil case). In 2003, three out of seven members of the Court of Appeals of Maryland in the *Oken* case held that a constitutional standard should instead be "beyond a reasonable doubt."

Last January, in *State v. Borchardt*, the Court of Appeals discussed an alternative but related standard of "beyond a lingering doubt." The court, quoting the U.S. Supreme

Court, defined this doubt as "a lingering uncertainty about facts, a state of mind that exists somewhere between beyond a reasonable doubt and absolute certainty."

This standard would not affect the "proof beyond a reasonable doubt" standard in order to convict a defendant, but it would help address the real concern that innocent people have been sentenced to death and executed, by making it more difficult to execute someone convicted only with circumstantial evidence or unreliable witness identifications. One way this might be done would be to legislate that convicted defendants need to be found deserving of death "beyond any reasonable doubt," and that includes against any "lingering doubt" that the person is innocent.

If Maryland adopted a higher standard of guilt, other states might follow. In particular, Virginia might follow suit by adopting a reasonable- or lingering-doubt standard. This would probably be the best that opponents of the death penalty could hope for from Virginia, with a populace that staunchly endorses the death penalty and with the most executions in the United States after Texas.

If O'Malley wants to continue to take a stand against any death penalty on moral, practical and legal grounds, he should do so. But he should also consider reasonable alternatives. A higher standard of proof for execution would go a long way toward ensuring the important societal and judicial goal of reducing the possibility that states will execute the innocent.

— Michael Wein
Greenbelt

These blue-collar areas are home to our nation's teachers, soldiers, firefighters, police officers, and construction and office workers. Yet despite their resilience and contributions, they speak without being heard. Despite many vocal appeals, they find themselves overlooked and underserved, receiving hollow commitments from government — particularly in the area of environmental protection.

Prius and Patagonia stereotypes aside, living in harmony with Mother Nature is an inter-class, multiracial imperative. Addressing the balance with our natural surroundings requires the exercise of power and is not dissimilar from guaranteeing the availability of food or public safety. The consequences of inaction are felt most acutely by the working class.

For years in New Orleans' Ninth Ward, community leaders urged upgrades to their flimsy levee system. The response from government was lackluster. When the storm came, these neighborhoods suffered terrible destruction and indignity that can never be undone.

For years, Edmonston residents urged county officials to upgrade their town's flood management system after suffering terrible floods. The response was lackluster. After an aggressive media campaign and with the images of Hurricane Katrina fresh in the public mind, decision makers came to the table with a solution.

But let's consider Cedar Heights and Fairmount Heights, two neighboring communities inside the Beltway in Prince George's. For years, residents have complained about poor air quality,

The propensity



Tony Garner puts
that would pump

A Shot at Curbing the

Del. Eleanor Holmes Norton (D-D.C.) and Rep. Jose E. Serrano (D-N.Y.) should be congratulated for accomplishing last year what many said was impossible: repealing the federal ban prohibiting the District from spending its own money on syringe exchange programs to reduce the spread of HIV-AIDS, hepatitis C and other infectious diseases. Because of their leadership, thousands of lives will be saved. If Congress takes the next step and repeals the national syringe ban, hundreds of

into drug treatment and medical care, rapid HIV testing, and a comprehensive adherence program.

Still, more needs to be done. The District should repeal phernalia laws to make more accessible through increase the number of treatment centers, and increase the number of drug treatment clients. The District should also make good

